STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 10-81:

SHELBY SCHOOL DISTRICT NO. 14,

Complainant,

- vs -

SHELBY EDUCATION ASSOCIATION, MEA, NEA,

Defendant.

FINAL ORDER

* *

No exceptions having been filed, pursuant to ARM 24.26.215, to the Findings of Fact, Conclusions of Law and Recommended Order issued on January 15, 1982, by Hearing Examiner Kathryn Walker;

THEREFORE, this Board adopts that Recommended Order in this matter as its FINAL ORDER.

DATED this 1st day of ~~February~~ March, 1982.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy
Chairman

* *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 3rd day of ~~February~~ March, 1982:

Duane Johnson
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Helena, MT 59624

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 18-81:

SHELBY SCHOOL DISTRICT NO. 14,

Complainant,

vs.

SHELBY EDUCATION ASSOCIATION, MEA, NEA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER.

On April 30, 1981, Complainant Shelby School District No. 14 filed an unfair labor practice charge with this Board alleging Defendant Shelby Education Association, MEA, NEA had engaged in bad faith bargaining by refusing to follow the terms of the negotiated agreement in violation of the requirements of sections 39-31-305(2) and 39-31-306(3) MCA.

On May 19, 1981, this Board received Defendant's Answer denying those charges.

Even though a question of contract interpretation was the essence of this unfair labor practice charge, the matter was not deferred under the Collyer doctrine because the charge was brought by the Employer, who had no recourse to the contract's grievance procedure, and because the parties' contract did not provide for binding arbitration, a prerequisite for Collyer deferral.

The pre-hearing conference in this matter was held August 17, 1981, in Shelby, Montana. At that conference, Complainant moved to amend its charge to allege that Defendant had violated section 39-31-402(2) MCA. The hearing examiner took Defendant's objection to this motion under advisement.

The hearing in this matter was held on the same day and in the same location as the pre-hearing conference. It was held under the authority of section 39-31-406 MCA and as provided for by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA. Kathryn Walker was the hearing examiner. Duane Johnson represented the Complainant. Jerry Painter represented the Defendant.

Shortly after the hearing, a ratified agreement resulted from the negotiations which had given rise to this unfair labor practice charge.

However, this charge was not withdrawn even though the immediate question of impasse resolution had been resolved, presumably because Complainant wanted a determination of the meaning of the disputed contract language for application in similar situations which might occur in the future.

This matter was deemed submitted on the day the last brief was filed, September 2, 1981.

ISSUE

When the parties to this matter were unable to agree on the terms of the collective bargaining agreement they were negotiating, was the Defendant required by the terms of the 1979-81 contract to submit the dispute to the Board of Review provided for in the contract when the Complainant requested it to do so? Did Defendant breach the 1979-81 contract, and in so doing commit an unfair labor practice, by refusing to submit the dispute to the Board of Review?

RULINGS ON MOTIONS UNDER ADVISEMENT

1. At the hearing, Complainant moved to amend its charge to allege that Defendant had violated section 39-31-402(2) MCA by engaging in bad faith bargaining by refusing to follow the terms of the negotiated agreement.

Defendant objected to this motion for the reasons stated in its brief:

> The Complainant requested that its complaint be amended at the hearing to include section 39-31-402(2) MCA. Amending the complaint at that late date is prejudicial to the Defendant. ARM 24.26.680(3)(c) provides that a complaint shall include the statute which has been violated. Its purpose, of course, is to give notice to the Defendants. It is to insure due process. Amending the complaint at that late a date, changing the entire theory of the proceedings, is prejudicial to the Defendant.

It is this hearing examiner's opinion that Defendant's rights would not be prejudiced by allowing this amendment to the Complaint because:

a. The Notice of Hearing in this matter indicated that a violation of section 39-31-402(2) MCA was the substance of the charge:

> On April 30, 1981, Complainant Shelby School District No. 14 filed an unfair labor practice charge with this Board alleging Defendant Shelby Education Association, MEA, MEA had engaged in bad faith bargaining, a violation of section 39-31-402(2) MCA, by refusing to follow the terms of the parties' negotiated agreement when an impasse situation developed. [Emphasis added.]

b. The Complaint clearly indicated that bad faith bargaining was the substance of the charge:

> Defendant has and is conducting itself in bad faith bargaining. The refusal to follow terms of the negotiated agreement is in violation of the exclusive representatives' good faith obligation in 39-31-305, Section 2, M.C.A. and 39-31-306, Section 3, M.C.A.
>
> By the above acts and by other acts and conduct, the Shelby Education Association, MEA, has interfered with the employer's right and is conducting negotiations in bad faith in violation of the Employee's rights guaranteed them in 39-31-305(2) and 39-31-306(3) of Montana Law and the terms of the current negotiated labor agreement.
>
> Having charged as filed herein, the Shelby School District No. 14 prays as follows:
>
> 1. That the defendants be ordered to cease and desist violative actions and to conduct good faith negotiations; . . .

c. The parties' "Stipulation of Facts Re: ULP 18-81" indicates that both parties were aware that failure to bargain in good faith was the essence of this charge:

> 8. On April 29, 1981, Complainant filed an Unfair Labor Practice Charge against Defendant which alleges bad faith bargaining.
>
> 9. On May 18, 1981, Defendant filed an answer to Complainant's Charge which denies the alleged bad faith bargaining charge.

Therefore, the hearing examiner overrules Defendant's objection and allows Complainant to amend its charge to include an alleged violation of section 39-31-402(2) MCA. This ruling is in accordance with ARM 24.26.205 which provides:

> Any petition may be amended in whole or in part, by the petitioner at any time prior to the casting of the first ballot in an election, or prior to the closing of a case, upon such conditions as the board considers proper and just.

2. The hearing examiner took under advisement Defendant's objections to the testimony of Brad Dugdale, an attorney who assisted the Complainant in its 1977 contract negotiations with the Defendant.

The hearing examiner agrees with the Defendant that Mr. Dugdale's testimony can be given little weight, primarily because she finds the contract language in question here to be clear and unambiguous. In so finding, she has noted that contract language cannot be considered ambiguous merely because the parties disagree over the meaning of a phrase, but rather must be judged by whether it is so clear on the issue in question that the intentions of the parties can be determined using no other guide than the contract itself -- whether a single, obvious, and reasonable meaning appears from a reading of the language in the context of the rest of the contract. (Hill and Sinicropi, Evidence in Arbitration, page 53).

Having found the contract language to be clear and unambiguous, and assuming the parties intended their contract to be the full and final integration of the agreements made during the negotiations process, the hearing examiner cannot allow Mr. Dugdale's testimony regarding the intent of the parties during negotiations to supplement or modify the terms of the contract. As declared by a noted arbitrator:

> If there is any one principle of contract interpretation upon which arbitrators are agreed, it is that where no ambiguity exists in the language of the contract, then the obvious intent of the Contract language governs and must be enforced; that the contracting parties must be presumed to have known what they were doing when they adopted the language which they did to express their bargaining intent; that parol evidence [any evidence whether oral or in writing which is extrinsic to the written contract and not incorporated therein by reference] cannot be relied upon to defeat the obvious intent of clear and unambiguous contract language; and that when the language of the Agreement is sufficiently clear as to enable the Arbitrator to reasonably ascertain the intent of that contract language, that ends the Arbitrator's inquiry and he must enforce the apparent intent of the words of the Agreement. [Hill and Sinicropi, Evidence in Arbitration, page 53]

FINDINGS OF FACT

The following findings of fact are as stipulated to by the parties:

1. Complainant operates Shelby School District No. 14 and is represented by a duly elected Board of Trustees.

2. Defendant is the recognized exclusive representative of the teaching staff at Shelby School District No. 14.

3. The parties are signatory to a Labor Agreement which became effective March 27, 1979, and which establishes wages, fringe benefits, and other conditions of employment. Said agreement is in force and effect until June 30, 1981.

4. The parties began negotiations concerning a new or renewal of the current Labor Agreement on December 4, 1980. A total of six negotiation meetings were conducted jointly by the parties.

5. On April 15, 1981, Complainant presented to Defendant a request in writing to invoke Article I, F, 4 of the current Labor Agreement.

6. On April 24, 1981, in a letter to Complainant, Defendant declined utilization of Article I, F, 4 of the current Labor Agreement.

7. In a request dated April 15, 1981, Defendant filed a petition

requesting Mediation assistance from the Board of Personnel Appeals.

8. On April 29, 1981, Complainant filed an Unfair Labor Practice Charge against Defendant which alleges bad faith bargaining.

9. On May 18, 1981, Defendant filed an answer to Complainant's charge which denies the alleged bad faith bargaining charge.

10. All documents referred to are by reference made a part of this stipulated Agreement.

The parties hereby agree that the foregoing statements of fact and referenced documents are hereby made a part of proceedings before the Board of Personnel Appeals.

DISCUSSION

This unfair labor practice charge centers around the meaning of the following sections of the parties' 1979-81 collective bargaining agreement:

Section I.F.3:

> If an impasse occurs and subjects for negotiations cannot be settled, the matter may be referred to a Board of Review[1] for study and recommendation in accordance with the following procedures:

Sections I.F.4(a) and (b):

> Procedures in the Event of a Negotiating Impasse
>
> a. An impasse condition will be recognized at the following points in the negotiations process:
>
> (1) If the Joint Committee[2] is able to reach an agreement but either the Board or the Association does not accept the Agreement, or,

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[1] *Section I.C.8 of the contract defines the "Board of Review" as:*

> *. . . a three (3) member board made up of persons living in the Shelby Districts; with the Board of Trustees naming one member, the Association another, and a third member, who will act as chairperson, but is not a member of either the Board of Trustees or of the Association, nor is related to a Board member or a member of the Association any closer than the third degree of affinity or the fourth degree of consanguinity and is to be selected by the first two members.*

[2] *Section I.C.7 of the contract defines the "Joint Negotiation Committee" as "a committee composed of the Board Representatives and the Negotiating Team of the Association Representatives as defined."*

(2) If at any point after the first meeting in November, and before January 30th,[3] the discussions of the Joint Committee reach a stalemate condition.

b. When an impasse condition exists:
(1) Either party may request in writing, within five (5) days, that a Board of Review may be formed.
(2) Within ten (10) days after receiving a written request that a Board of Review be formed, the Board and the Association will each appoint one person to serve on the Board of Review.
(3) When the two people above have been named, they in turn will appoint the third member of the Board of Review within ten (10) days.

To determine the validity of the unfair labor practice charge under consideration here, the hearing examiner must answer two questions regarding these contract provisions:

1. Is the language in sections I.F.3 and 4(b) permissive or mandatory as to the submission of a contract dispute to the Board of Review?

2. If that language is mandatory, is it so only under the conditions specified in I.F.4(a)?

It is this hearing examiner's determination that if either party requests, in writing and within five days, that a Board of Review be formed, the other party is mandated to participate in that Board of Review process if that impasse situation meets the criteria set forth in section I.F.4(a) of the contract.

In determining whether the language in question is mandatory or permissive, the hearing examiner has noted the following:

> . . . the "primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties and to interpret the meaning of a questioned word or part with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions.'
> Similarly, "Sections or portions cannot be isolated from the rest of the agreement and given construction independently of the purpose and agreement of the parties as evidenced by the entire document. . . . The meaning of each paragraph and each sentence must be determined in relation to the contract as a whole."
> [Elkouri and Elkouri, How Arbitration Works, page 307]

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[3] *Section I.E.7 of the contract states:*

In attempting to reach an agreeable settlement of the negotiations proposals prior to the time when special levy amounts are set by the Board, the Board and the Association agree that every effort shall be made to reach a settlement prior to January 30th each year.

Considering the above-stated principle, the word "may" in section I.F.3 cannot be isolated so as to make participation in the Board of Review process entirely permissive. Rather, it must be construed as part of a larger section dealing with the submission of contract disputes to the Board of Review. In so doing, the phrase "may be referred to a Board of Review" in section I.F.3 loses its permissive connotation when section I.F.4(b)(1) states "either party may request . . . that a Board of Review may be formed" (emphasis added) and sections I.F.4(b)(2) and (3) specify that if either party exercises its option to request the formation of the Board of Review the parties will appoint members to serve on said Board (subject to the conditions discussed below).

Addressing the significance of the conditions specified in section I.F.4(a), the hearing examiner notes it is a frequently applied rule of contract interpretation that to expressly include one or more of a class in a written instrument must be taken as an exclusion of all others -- for example, to expressly state certain exceptions indicates that there are no other exceptions, or to expressly include some guarantees in an agreement is to exclude other guarantees. (Elkouri and Elkouri, How Arbitration Works, page 330.)

The hearing examiner realizes that section I.F.4(a) does not list all conditions under which an impasse situation might exist. However, in determining the meaning of this section, she must be governed by the fact that section I.F.4(a) contains a very specific enumeration of the points in the negotiations process at which an impasse condition will be recognized for the purposes of the Board of Review. The section in no way indicates that it is not meant to be restricted to the points specifically listed -- it is absent any statement that it is a list of examples, that it is a list "including but not limited to" the conditions set forth, or that the Board of Review is to address any impasse situation but especially those listed in the section. Therefore it must be the hearing examiner's determination that for the purposes of the contract's Board of Review an impasse situation is to be recognized at the two points in the negotiations process listed in section I.F.4(a): when the negotiating teams reach a tentative agreement that is not

ratified by either the School Board or the Association membership (at any time), or if the negotiations reach a stalemate condition after the parties' first meeting in November but before January 30th (a target date for settlement according to section I.E.7 of the contract).

Given this determination of the meaning of the contract language in question, the hearing examiner concludes that, because Complainant did not request the formation of the Board of Review until April 15, 1981, well after the January 30th date specified in section I.F.4(a) of the contract, the Defendant was not obligated to participate in the Board of Review process.

CONCLUSION OF LAW

Defendant Shelby Education Association, MEA, NEA did not violate section 39-31-402(2) MCA or otherwise commit an unfair labor practice when it refused to participate in the Board of Review process provided for by the parties' collective bargaining agreement.

RECOMMENDED ORDER

This unfair labor practice charge is hereby dismissed.

NOTICE

Exceptions to these Findings of Fact, Conclusion of Law, and Recommended Order may be filed with the Board of Personnel Appeals, Capitol Station, Helena, Montana 59620 within twenty days of service. If no exceptions are filed, the Recommended Order shall become the Final Order of the Board.

DATED this 15th day of January, 1982.

BOARD OF PERSONNEL APPEALS

By Kathryn Walker
Kathryn Walker
Hearing Examiner

CERTIFICATE OF MAILING

I, Kathryn Walker do hereby certify and state that I did on the 15th day of January, 1982, mail a true and correct copy of the above Findings of Fact, Conclusion of Law, and Recommended Order to the following: